STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN HOWELL,

Plaintiff-Appellee,

v

DEXTER DAVIS and JC PENNEY CO., INC.,

Defendants-Appellants.

UNPUBLISHED
September 24, 2009

No. 284971
Kent Circuit Court
LC No. 05-009618-NO

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

In this negligence action, a jury returned a verdict of no cause of action. Subsequently, the trial court granted plaintiff's motion for new trial. The trial court determined that plaintiff's credibility was critical to the outcome of the case and that an improper attack on the veracity of plaintiff due to her involvement in prior lawsuits required a new trial even though the jury was given cautionary instructions. We reverse.

Defendants argue that the trial court abused its discretion by granting plaintiff a new trial because (1) the jury's verdict was supported by properly admitted evidence that called into question both plaintiff's credibility and her theory of the case, and (2) any possible error resulting from defense counsel's questioning of plaintiff regarding her prior lawsuits was corrected by the trial court's timely curative instructions. We agree.

We review the trial court's decision to grant a new trial for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). MCR 2.611(A)(1)(b) permits a trial court to grant a motion for a new trial if the prevailing party committed misconduct that affected the moving party's substantial rights. "When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). An attorney's comments usually will not be cause for reversal unless they reflect a deliberate course of conduct aimed at preventing an impartial and fair trial, or deflect the jury's attention from the issues of the case and have a controlling influence on the verdict. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 501-502; 668 NW2d 402 (2003); *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).

During cross-examination, defense counsel questioned plaintiff with regard to her response to an interrogatory wherein she stated that she filed a lawsuit in 1994 relating to a slip

and fall at a Dayton Hudson store. Defense counsel's questioning implied that plaintiff did not truthfully answer the interrogatory because plaintiff also filed a lawsuit in 1999 relating to personal injuries incurred while eating at a restaurant. Comments that generally suggest that a witness is lying are improper only if the accusation is unsubstantiated. *Powell v St John Hosp*, 241 Mich App 64, 80; 614 NW2d 666 (2000). In this case, defense counsel was justified in arguing that plaintiff's failure to provide the information about the 1999 lawsuit in response to interrogatories was probative of plaintiff's credibility. *Id*. Defense counsel also inferred that plaintiff did not truthfully answer the interrogatories when she indicated that she possessed no special training in the law despite the fact that she was a paralegal who was schooled at the Paralegal Institute of Georgia. Defense counsel was justified in arguing that plaintiff's failure to provide the information about her specialized training in the law in response to interrogatories was probative of plaintiff's credibility. *Id*. While defense counsel's statements may have also been made in an attempt to portray plaintiff as a litigious person, *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996), or to personally attack the victim, any errors were harmless because defense counsel's comments did not reflect a deliberate course of conduct aimed at preventing an impartial and fair jury. *Reetz*, *supra* at 103; *Hunt*, *supra*.

In addition, ample evidence was presented to cast doubt on plaintiff's version of events. Although plaintiff asserted that 34 people saw the condition of her hair after her appointment, only the testimony of plaintiff's mother supported plaintiff's version of events. Conversely, the testimony of Dexter Davis, the salon employee who worked on plaintiff's hair and allegedly damaged plaintiff's hair and scalp, directly contradicted plaintiff's testimony. The testimony of Amy Orban, the JC Penney hair salon manager on the date of the incident, and Taryn Meyer, the receptionist at the salon on the date plaintiff asserted she returned to the salon to complain, both directly contradicted plaintiff's testimony. In addition, plaintiff did not present any substantive proof to establish when the photographs depicting her damaged hair were taken. Rather, the evidence established only that the photographs were taken on or before August 18, 2004, and did not establish that the condition of plaintiff's hair resulted from her treatment at the JC Penney hair salon.[1] Moreover, although plaintiff asserted that she experienced great pain and agony, she was not treated by a medical professional until August 5, 2004, almost three weeks after she alleges that her hair was damaged. Consequently, there was ample evidence to cast doubt on plaintiff's version of events. Under these circumstances, we cannot conclude that defense counsel's comments deflected the jury's attention from the issues involved and had a controlling influence on the verdict. *Hunt*, *supra*. Thus, any error that may have resulted from defense counsel's statements was harmless. *Reetz*, *supra*.

Additionally, instructions to the jury are presumed to cure most errors. *Hill v Husky Briquetting, Inc*, 78 Mich App 452, 460; 260 NW2d 131 (1977). Jurors are presumed to understand and follow a court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Instructions by a trial court to the jury before opening statements and following closing arguments that the statements of counsel are not evidence is generally

[1] Thus, defense counsel argued during closing arguments that whatever happened to plaintiff's hair happened after July 14, 2004.

sufficient to cure any prejudice which might arise from remarks by counsel that are improper. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). In this case, the trial court not only instructed the jury during opening statements and closing arguments not to accord any evidentiary weight to the lawyers' arguments, and to not consider the lawyers' questions except where necessary to understand a witness' answer, but did so in the midst of defense counsel's questioning of plaintiff. The trial court specifically stated with regard to defense counsel's questioning of plaintiff regarding the 1999 lawsuit that it was limiting the jury's consideration of that lawsuit to the fact "that she filed a prior lawsuit, period." Further, the trial court stated with regard to the bankruptcy petition "[n]one of this is relevant to what we're dealing with here. . . . and it's got no place in this courtroom." The following day, the trial court specifically instructed the jury:

> With regard to those interrogatories yesterday, ladies and gentlemen, there were discussions about two lawsuits involving Ms. Howell. One was a case in this court which she did file involving something that happened at a restaurant down in Mississippi. You can consider the fact that she made a claim that she got ill as a result of eating at a restaurant for whatever you think it illuminates in this case, but I don't want you to misuse that information. The suggestion was left that the lawsuit was dismissed because it lacked merit. That's not what happened. The lawsuit was dismissed because it was filed in the wrong court. The judge decided that the matter should have been filed in Mississippi, not in Michigan, so he dismissed it here. And, of course, that freed people to re-do it in the other state. What happened there, I have no idea. And -- but what's important to know is that the suggestion that the judge had decided there wasn't merit to the lawsuit simply never happened. It doesn't mean there was. It never got that far. It simply is a situation where it was dismissed because the owner of the restaurant lived in Mississippi and should have been sued in Mississippi because the restaurant was in Mississippi.
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> And then the other matter raised was a lawsuit against Ms. Howell. Frankly, the fact that someone was sued is utterly irrelevant and should just be plain ignored. There's another reason to ignore it and that is it was a simple small claims action in District Court. Those are handled so informally that we never read anything into them because they don't have trials, they don't go through all the things we normally do. People sometimes meet with the judge, sometimes they don't, sometimes they meet with the magistrate. You just never know what, if anything, was determined in those particular cases. So use the filing of a lawsuit here involving something at a restaurant in Mississippi for whatever you think it helps you understand, but don't conclude that it was dismissed for lack of merit in the allegations 'cause that's not why it was dismissed. And as far as the small claims action is concerned, just ignore it.

The trial court's instructions were sufficient to cure any prejudice that may have arisen from counsel's statements. *Tobin*, *supra; Hill*, *supra*. Plaintiff has failed to establish that she was denied a fair trial. *Reetz*, *supra* at 102-103. The trial court abused its discretion in granting a

new trial. *Kelly*, *supra*.

Reversed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra